U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

COLIN DEBUSE,	**ARB CASE NO. 2022-0019**
COMPLAINANT,	**ALJ CASE NO. 2020-AIR-00015**
v.	**DATE: May 13, 2022**
CORR FLIGHT S. d/b/a NICHOLAS AIR,	
RESPONDENT.	

Appearances:

For the Complainant:
Gary Linn Evans, Esq., George Andrew Coats, Esq., and Albany L. Ashiru, Esq.; *Coats & Evans, P.C.*; The Woodlands, Texas

For the Respondent:
Edwin S. Gault, Esq.; *Forman Watkins & Krutz LLP*; Jackson, Mississippi; Wendi Litton, Esq.; *Nicholas Air*; Oxford, Mississippi

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER AFFIRMING IN PART AND VACATING AND REMANDING IN PART

PER CURIAM. Colin DeBuse (Complainant) filed a complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] (AIR 21), and its implementing regulations,[2] alleging that his former employer, Corr

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[1] 49 U.S.C. § 42121 (2000).

[2] 29 C.F.R. Part 1979 (2021).

Flight S. (Respondent), unlawfully discriminated against him under the AIR 21's whistleblower protection provisions. After a hearing, an Administrative Law Judge (ALJ) found that Respondent had violated the AIR 21 and awarded Complainant damages. Respondent appealed the ALJ's decision to the Administrative Review Board (Board). For the reasons discussed below, we vacate and remand in part and affirm in part the ALJ's decision.

BACKGROUND

Complainant began working as a first officer pilot for Respondent, a pilot management company, on October 15, 2018.[3] Complainant possessed a commercial pilot's license and 2,600 of flight time but had little experience piloting Part 135 flights, which are flights that include passengers on board.[4] In September of 2019, Complainant accepted an opportunity from Respondent to receive training to become a qualified second in command and completed ground school training for a Phenom 300 aircraft on October 1, 2019.[5] On October 10, 2019, Respondent offered Complainant a promotion and pay raise.[6]

On October 15, 2019, Complainant began an eight-day flight rotation on a Phenom 300 aircraft with Captain Stacey Lee.[7] On October 16, 2019, they flew from Chicago, Illinois to Las Vegas, Nevada.[8] Complainant served as an observer on the flight and did not have any in-flight responsibilities.[9]

The flight to Las Vegas had passengers aboard, and Lee was the only person qualified and certified to operate it.[10] While at flight level, Lee left the cockpit to use the bathroom.[11] Complainant testified that Lee did not tell him why he was leaving.[12] Lee testified that he had explained that he needed to use the bathroom and that Complainant had voiced no objection after he asked if it was okay to leave.[13] Lee testified that he was away from the cockpit for three to four minutes,

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3 Decision and Order Granting Relief (D. & O.) at 3, 7.

4 *Id.* at 7, 24.

5 *Id.* at 4.

6 *Id.*; Complainant's Exhibit 6.

7 D. & O. at 4.

8 *Id.* at 9.

9 *Id.* As an observer, Complainant could not operate the flight in any manner. *Id.*

10 *Id.* at 10.

11 *Id.* at 11.

12 *Id.*

13 *Id.*

while Complainant testified that Lee had left for twenty to thirty minutes.[14] When Lee returned, he asked Complainant to debrief him on anything he had missed, and Complainant replied there were no changes or radio communications.[15] Lee testified that Complainant had not expressed any safety concerns to him about his absence.[16] After landing, Complainant conducted his post-flight actions quickly, and Lee admonished him for being in such a rush.[17]

Later that day, Complainant made a call to a dispatcher for Respondent, which was recorded.[18] Complainant discussed Lee's actions after they had landed but did not mention Lee's absence from the cockpit.[19] Complainant testified that he had received two other calls that day from dispatch in which he believed that he had reported Lee leaving the cockpit, though those calls were not recorded.[20] On October 17, 2019, Complainant called the Federal Aviation Administration (FAA) to report Lee's absence from the cockpit.[21]

On October 19, 2019, Complainant spoke with Nick James, a Chief Pilot for Respondent, about Lee leaving the cockpit and informed him that he was not qualified to fly the aircraft at the time.[22] On November 1, 2019, a captain for Respondent informed Complainant that he had upcoming training with either Captain Jimmy Nicks or Captain Lee.[23] Complainant responded that he would not work with Lee.[24] The captain responded that Nicks could be "getting his FAA observation next rotation so [Lee] may be the only option."[25] Complainant again stated that he refused to fly with Lee.[26] Complainant requested a meeting with management to discuss safety issues he had seen and his experiences with Lee.[27]

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14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 12.

18 *Id.*

19 *Id.* at 13.

20 *Id.*; Hearing Transcript (Tr.) at 139-40, 146-47, 229-31.

21 D. & O. at 13, 25; Tr. at 232.

22 D. & O. at 13.

23 *Id.*

24 *Id.*

25 Exhibit 9.

26 *Id.*

27 D. & O. at 13-14.

On November 22, 2019, Complainant conducted an audio conference call with Chief Pilot James, Michael Prinzi, the Director of Operations, and Fernando Pineda, the Executive Vice President of Operations.[28] Pineda informed Complainant that he was being paired with Lee for training.[29] Complainant refused to train with Lee, stating that Lee had left him at the controls to go talk to a customer.[30] Prinzi asked him if he was refusing to fly the following week, and Complainant answered that he was refusing to fly with Lee.[31] Prinzi told Complainant that he would talk to Lee about his concerns but that he still had to train with Lee.[32] When Complainant again refused to train with Lee, Pineda told Complainant that his concern was not a safety issue.[33] James told Complainant that he had spoken with Lee about Complainant's concerns and that Lee admitted to leaving the cockpit to use the restroom but not to spending 45 minutes chatting.[34] Prinzi insisted that if Complainant refused to train with Lee that he should "send [him] a resignation."[35] Complainant stated that he would fly with another instructor but Pineda refused to reassign him.[36] Pineda warned Complainant that he would consider Complainant failing to show up for his scheduled flights as a refusal of an assignment and his resignation.[37]

After the call, Prinzi discussed with the others whether to terminate Complainant's employment.[38] Prinzi considered that Complainant had already worked for Respondent for 14 months and wanted to give him an opportunity to complete his training.[39] Prinzi testified that he did not assign Complainant to another instructor because allowing a pilot to dictate who he will fly with would create "a logistical nightmare."[40] Later that day, Prinzi sent Complainant an email with an "Employee Warning Letter" attached and told Complainant that he may

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28 *Id.* at 14.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*; Joint Exhibit (JX) 4 at 6.

35 D. & O. at 14-15.

36 *Id.* at 15; JX 4 at 9-10.

37 D. & O. at 15.

38 *Id.*

39 *Id.*

40 *Id.*

have found a solution for continuing Complainant's training.[41] The letter provided that Respondent would place Complainant on unpaid leave starting November 25, 2019, because of his refusal to undergo training with Lee, which would end once a simulator training date could be established with a third-party.[42]

On November 25, 2019, Complainant and Prinzi spoke about the letter, and shortly after, Prinzi sent Complainant an email stating that Complainant had received a written warning three days earlier.[43] The email had a training agreement attached, which Prinzi told Complainant was no different than the agreements that other pilots training with third parties had executed with Respondent.[44] The agreement provided that Respondent would pay for the third-party training if Complainant agreed to serving twelve months for Respondent.[45] Prinzi asked Complainant to let him know if he was going to accept or refuse the offer by November 27, 2019.[46] Respondent would schedule the training as soon as Complainant accepted it.[47] On November 26, 2019, Complainant asked Prinzi for a week for his attorney to review the agreement after perceiving errors in the contract.[48] Prinzi testified that Complainant never asked to change the agreement's terms and that Complainant's lawyer never contacted him about the agreement.[49] Complainant never provided a signed training agreement.[50]

On November 27, 2019, Complainant responded to Prinzi's email expressing skepticism that his safety concerns were being considered seriously and that they were possibly trying to discriminate against him by forcing him to sign a $20,500 training agreement that other pilots did not have to sign.[51] Complainant wrote to Pineda and James that he was not quitting and that he would train in-house with a pilot besides Lee.[52] On November 27 and 28, Complainant inquired about the status

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41 *Id.*

42 *Id.*

43 *Id.*; Exhibit 13.

44 D. & O. at 16; Exhibit 7.

45 D. & O. at 3.

46 *Id.* at 4.

47 *Id.*

48 *Id.* at 16.

49 *Id.*

50 *Id.*

51 *Id.* at 17. Complainant would have to pay the training costs only under certain circumstances, such as if he failed the course or refused to take drug or alcohol tests. *Id.*; JX 1.

52 D. & O. at 17.

of his employment, and Pineda told him to have his attorney contact Respondent's in-house counsel with any communication or requests.[53] Complainant made the same inquiry on December 7, 2019, and the in-house counsel instructed him to refer to the warning letter for clarification.[54]

On December 10, 2019, Complainant received a letter from Pineda accepting his resignation by his refusal to accept the terms and conditions of his employment.[55] Complainant's last day of paid work was November 25, 2019.[56] On December 12, Complainant filed a hotline complaint with the FAA regarding Lee's absence from the cockpit.[57]

On February 19, 2020, Complainant filed an AIR 21 retaliation complaint with the Occupational Safety and Health Administration (OSHA).[58] On May 28, 2020, OSHA found that Complainant did not establish a reasonable cause to believe Respondent retaliated against him and dismissed the complaint.[59] Complainant objected to OSHA's findings and requested a hearing with an ALJ. On April 26 to 28, 2021, an ALJ held a hearing on the matter.

On December 8, 2021, the ALJ issued a Decision and Order Granting Relief. The ALJ first found that the witnesses at the trial were generally credible and noted that the parties stipulated that Respondent is a covered employer and Complainant is a protected employee under the AIR 21.[60]

The ALJ discussed whether Complainant's reporting of Lee's departure from the flight deck to Chief Pilot James on October 19, 2019, was a protected activity of making a safety report.[61] The ALJ found that Complainant had a good faith subjective belief that Lee committed an FAA violation.[62] The ALJ determined that

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53 *Id.* at 5.

54 *Id.*

55 *Id.* at 17.

56 *Id.*

57 *Id.*; JX 5.

58 D. & O. at 1.

59 *Id.*; Exhibit 1.

60 D. & O. at 20-21.

61 An employee engages in activity protected under the AIR 21 when he or she provides information relating to any violation or alleged violation of an FAA rule or other federal law relating to air carrier safety to their employer or the federal government. 49 U.S.C. § 42121(a).

62 D. & O. at 22.

Complainant had demonstrated his belief when he called dispatch the following day and spoke to James about the incident and noted that the departure of the only qualified pilot would reasonably alarm Complainant.[63]

The ALJ further found that Complainant's concerns were objectively reasonable.[64] The ALJ found that Complainant was aware of the requirement of Part 91, which provides that each required flight crewmember shall be at their crewmember stations unless the absence is necessary to perform duties in connection with operation of the aircraft or in connection with physiological needs, and that Part 135 flights are subject to greater scrutiny than Part 91 flights.[65] The ALJ found that Lee could have taken other measures to avoid leaving the cockpit and noted that no witness had testified that Lee's absence was prudent.[66] Therefore, the ALJ found that Complainant had engaged in a protected activity when reporting Lee's absence from the cockpit to James.[67] The ALJ also found that Complainant's hotline complaints to the FAA were protected activities.[68]

The ALJ next discussed whether Respondent committed adverse actions against Complainant. The ALJ found that Respondent placing Complainant on leave without pay and terminating his employment were adverse actions.[69] The ALJ found that Respondent's providing the option to attend paid training with a third party was not adverse.[70]

The ALJ then considered whether Complainant's protected activity was a contributing factor in the adverse actions against him. The ALJ noted that Complainant had specifically referenced Lee's absence from the cockpit as a reason for refusing to train with Lee during the November 22, 2019 meeting and that the testimony was unanimous that Lee's absence was not prudent.[71] The ALJ found Pineda's attempt to bifurcate the incident from the scheduled training with Lee was disingenuous and that his opinion that the event was not a safety issue was troubling.[72] The ALJ therefore found that Complainant's report of the incident was

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63 *Id.*

64 *Id.*

65 *Id.* at 23-24. Part 91 flights are noncommercial.

66 *Id.* at 24-25.

67 *Id.* at 25.

68 *Id.*

69 *Id.* at 27.

70 *Id.*

71 *Id.* at 29.

72 *Id.*

a contributing factor in his suspension without pay, noting that the event was the "underlying cause for his refusal" to train with Lee.[73] Accordingly, the ALJ concluded that Complainant had proven his prima facie case and that the burden therefore shifted to Respondent to prove its affirmative defense.[74]

The ALJ next discussed whether Respondent had proven that it would have committed the adverse actions absent the protected activity. The ALJ found that Complainant's refusal to train with Lee was not an independent basis to place Complainant on unpaid leave because it was not clear why the assignment was necessary in conducting Respondent's operations since Complainant was merely an observer.[75] The ALJ found Complainant's refusal to train with Lee was a direct result of an unsafe act by Lee and therefore that he was not persuaded that Respondent would have suspended Complainant in absence of the refusal to train because of his reported safety concerns.[76]

The ALJ however found the refusal to sign the training agreement was an intervening event in the decision to discharge Complainant.[77] Respondent attempted to accommodate Complainant's concerns by offering the third-party training and recognized that Respondent had more pilots to train than instructors.[78] The ALJ found that the offer meant Complainant had received favorable treatment and that the training contract was commonplace in the aviation industry.[79] The ALJ found Respondent made a good faith effort to resolve the problem, giving Complainant an opportunity to discuss any concerns he had with the agreement.[80] The ALJ credited Respondent's position that Complainant did not get to decide who trained him and that Respondent had little choice but to fire him once he refused to sign the agreement.[81] The ALJ therefore found that Respondent had proven that it would have terminated Complainant absent any protected activity.[82]

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73 *Id.*

74 *Id.* at 29-30. The ALJ noted in the decision's conclusion section that he found that the protected activity had also contributed to Complainant's termination. *Id.* at 32.

75 *Id.* at 30.

76 *Id.* at 31.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 31-32.

82 *Id.* at 32.

The ALJ then considered what damages were warranted for Complainant's suspension without pay. The ALJ found that Complainant was entitled to back pay from the date of his suspension, November 25, 2019, until his termination on December 10, 2019.[83] Based on Complainant's salary at the time, the ALJ calculated $2,703.24 in back pay for the fifteen-day suspension, plus interest.[84] The ALJ did not find any further damages were warranted.[85]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[86] The Board reviews questions of law presented on appeal de novo but is bound by the ALJ's factual findings if they are supported by substantial evidence.[87]

DISCUSSION

To prevail in a retaliation case under AIR 21, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity that was a contributing factor in the adverse employment action taken against them.[88] If the complainant meets his or her burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[89] Respondent contests two findings in the ALJ's decision on appeal.

Respondent argues that Complainant's refusal to train with Lee was not an activity protected by the AIR 21. In its opening brief, Respondent contends that Complainant's safety concerns regarding flying with Lee were not objectively and

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83 *Id.* at 35.

84 *Id.*

85 *Id.* at 33-36.

86 29 C.F.R. § 1979.110(a).

87 *Yates v. Superior Air Charter, LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019) (citing 29 C.F.R. § 1979.110(a)). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hoffman v. NetJets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 4 (ARB Mar. 24, 2011) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

88 *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021); 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

89 *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5; 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

subjectively reasonable, noting that Complainant had never voiced his concerns to Lee during the flight and that it was the only safety issue he had observed Lee commit. In his response brief, Complainant contends that the refusal to train with Lee was reasonable because the evidence demonstrated that Lee's absence from the cockpit was not prudent.

However, as noted by Respondent in its reply brief, the ALJ never expressly found whether Complainant's refusal to train with Lee was a protected activity. Complainant had argued to the ALJ that the refusal was an activity protected by the AIR 21,[90] but the ALJ never addressed the argument in his decision. We therefore hold that the ALJ erred in failing to consider all alleged forms of protected activity[91] and must remand the case for the ALJ to address Respondent's argument that Complainant's refusal to train with Lee was not a protected activity under the AIR 21.[92]

Respondent further contests the ALJ's finding that Complainant's report to James about Lee's absence from the cockpit was a contributing factor in the decision to suspend him without pay. Respondent argues that the finding lacked substantial evidence, noting that Complainant continued to receive flight rotation assignments without incident after making the report and that nothing adverse occurred until he refused to train with Lee. Complainant cites the temporal proximity of about one month as evidence of contribution.

We do not reach this argument because the ALJ did not consider all alleged protected activities before beginning his contribution analysis. If the ALJ finds on remand that Complainant's refusal to train with Lee was a protected activity, the ALJ would then need to consider whether the refusal alone or together with other

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90 Complainant's Post-Hearing Brief at 13-14.

91 *See Williams v. Capitol Ent. Servs., Inc.*, ARB No. 2005-0137, ALJ No. 2005-STA-00027, slip op. at 8 (ARB Dec. 31, 2007) (remanding the case because the ALJ did not address all protected activities alleged by the complainant); *Bucalo v. Teamsters Local 100*, ARB No. 2021-0030, ALJ No. 2018-STA-00082, slip op. at 4-5 (ARB Aug. 11, 2021) (remanding because the ALJ did not address the complainant's whistleblower claim against one of the named respondents); *Farrar v. Roadway Express*, ARB No. 2006-0003, ALJ No. 2005-STA-00046, slip op. at 10 (ARB Apr. 25, 2007) (remanding because the ALJ dismissed the complaint without addressing an act that the complainant alleged was retaliation).

92 Respondent also argues that even if the refusal to train with Lee was a protected activity, the refusal lost its protected status once James informed Complainant in the call on November 22, 2019, that he had spoken with Lee about Complainant's concerns. *See Sitts v. COMAIR, Inc.*, ARB No. 2009-0130, ALJ No. 2008-AIR-00007, slip op. at 15 (ARB May 31, 2011) ("Generally, under whistleblower statutes, when a safety concern has been investigated and determined to be safe, and has been adequately explained to the employee, the employee's continuing safety concern is no longer protected."). Because the ALJ did not find whether the refusal to train was a protected activity, we do not reach this argument.

protected activities contributed to Respondent's decisions to suspend him without pay. We therefore vacate the ALJ's contribution finding.[93] We request that the ALJ clearly state on remand which protective activities he finds contributed to each adverse action and which he finds did not.[94]

Accordingly, we **VACATE** the contribution findings, the finding that Respondent failed to prove its affirmative defense for the suspension, and the damages award and **REMAND** the case with instructions to find whether Complainant's refusal to train with Lee was a protected activity under the AIR 21. If the ALJ finds that any protected activity contributed to the suspension, he shall award appropriate damages if Respondent fails to prove that it would have suspended Complainant without pay absent the protected activity. We **AFFIRM** all other aspects of the ALJ's Decision and Order Granting Relief.[95]

SO ORDERED.[96]

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[93] *See Williams*, ARB No. 2005-0137, slip op. at 8 ("To properly evaluate whether protected activity contributed to [the employer's] decision to terminate [the employee's] employment, all instances of protected activity must be thoroughly assessed.").

[94] We note that most of the contribution analysis seemingly discusses whether the refusal to train with Lee contributed to the suspension without pay before ultimately finding that the report to James contributed to the decision to suspend Complainant, despite the absence of an express finding that the refusal was a protected activity. *See* D. & O. at 29. It is therefore unclear which activity the ALJ found to have contributed to the suspension. On remand, the ALJ shall make separate findings for each protected activity concerning whether they were contributing factors in the decision to suspend Complainant without pay.

[95] Complainant did not appeal any aspect of the ALJ's decision, including the finding that Respondent proved that the decision to terminate his employment would have occurred absent his protected activity. Thus, we do not disturb the ALJ's finding that Respondent proved its affirmative defense for the termination.

[96] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).